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Welfare, corporatism, and criminal justice : comparing Durkheim and the new institutionalists

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ABSTRACT

Émile Durkheim known among other things for his pioneering sociology of criminal law was also a corporatist theorist and can be interpreted as a predecessor for an institutionalist approach that has recently gained popularity in comparative criminal justice. Durkheim suggested an inverse relationship between the intensities of “repressive” regulation and “restitutive” welfare state regulation. Contemporary institutionalist research has arrived at the same conclusion, but the connection between Durkheim’s theory and the empirical observations of modern comparative research has gone largely unnoticed in both legal scholarship and sociology. Correcting this omission might prove useful for substantive theory: Apart from welfare state strength, neo-institutionalist research has also associated lenient criminal law with corporatist political economy and consensus democracy. Durkheim’s political sociology proposes an answer for the interrelationship between these factors. Durkheim considered social corporatism a democratic institution and as such a precondition for a democracy capable of building the collective restitutive regulation that could alleviate society’s reliance on punitive justice as a basis for social cohesion.

INTRODUCTION

Émile Durkheim (1858–1917) pioneered theorizing on criminal justice with an external perspective on its role in society. Once considered exhausted (Lukes and Scull 1983), Durkheim’s substantive theory has received some renewed interest in sociology of law. For example, Susanne Karstedt (2007) deemed Durkheim’s macro theory a failed one but praised the rediscovery of the “cultural Durkheim” while Fergus McNeill and Matt Dawson (2014) analysing probation pointed to Durkheim’s political sociology for a fuller appreciation of his contribution.

My examination concerns criminal justice in the grand scheme of Durkheim’s legal and political theory. Punishment has a key place in Durkheim’s general sociology of law. He, first, defined criminal law by the use of a penal sanction and, second, contrasted this penal law with modern “restitutive” positive law. According to Durkheim, both types of regulation are ways of holding societies together, but the way they build cohesion is fundamentally different. Today an increasingly established neo-institutionalist school in comparative criminal justice focuses on punishment and explains variation in its intensity through welfare state model, production regime, and political system.

In sociology of criminal law Durkheim is regularly presented as the initiator of a symbolic line of theorizing that emphasizes the cultural meaning of punishment (see esp. Smith 2008), while a neo-Marxist materialist approach was begun later by Georg Rusche and Otto Kirchheimer of the critical Frankfurt school. Rusche and Kirchheimer’s work rose to an exemplary status when a renaissance of sociology of punishment began in the 1970s and inspired Michel Foucault among others (Simon 2013). For Foucault prison was a creative instrument in “the political economy of the body”. I argue that when the idea of *the political economy of punishment* (here understood broadly as criminal justice manifesting wider regulatory regimes) is taken towards an institutionalist and comparative direction, as has recently happened, it is possible to read Durkheim in a way that is not alternative but complimentary to it and has potential to improve it. There is a certain legacy of Durkheim that is largely missing from the scholarly literature of punishment and society.

The breadth of this writing is limited to the evaluation and comparison of the basic theses of the new institutionalists with Durkheim’s. It is meant as a somewhat benign attempt to construct, through interpretation, a substantively useful “institutionalist” Durkheim for the framing and analysis of the neo-institutionalist findings. I argue that a useful Durkheim can be found in some of the repeating themes of his work. The writing is not, however, a history of ideas, and controversies regarding for example the evolution of Durkheim’s thought towards his later works are mostly out of its

scope (for some contemporary readings with significant similarities to mine in wider Durkheim scholarship see Mackert 2004; Herzog 2018). While Durkheim was more engaged in explaining modernization than differences between types of modernity, it is quite possible to adapt insights from the first one for the purposes of the second. Durkheim's theory offers a way to understand the inverse association between punishment and welfare state expenditure. Furthermore, it offers a parsimonious causal explanation for the interrelationship of this association with market coordination and democracy. The objects of this writing are to present this compatibility between Durkheim's theory and contemporary empirical work and to formulate a Durkheimian causal explanation for the findings of the latter.

I start by evaluating the neo-institutionalist comparative criminal justice of Michael Cavadino and James Dignan, and Nicola Lacey and presenting the central findings of institutionalist comparison more generally ("New Institutionalism in Comparative Criminal Justice"). Second, I elucidate the importance of norms and institutions to Durkheim's sociology ("Durkheim the Moralist"). Third, I conclude that the empirical findings of contemporary comparative research are compatible with the basic theses of Durkheim's legal theory ("Durkheim's Sociology of Law"). In the last section before conclusion I propose that Durkheim's political theory offers a causal explanation for the static empirical correlations Durkheim and institutionalist theory agree on ("Political Conditions for Organic Solidarity").

NEW INSTITUTIONALISM IN COMPARATIVE CRIMINAL JUSTICE

In their classic monograph Rusche and Kirchheimer (1939) concluded that the history of punishment is determined by the labour markets: In times of labour shortage forced labour has been utilized to fill the deficit. In times of labour surplus penal measures have been used to warehouse or dispose of the excess. The level of harshness in punishment always sets itself so that even the poorest remains deterred. Foucault's (1979) later quest was to explain the birth of the prison. He attributed it to the demand of the bourgeoisie in industrializing society for a denser and more efficient criminal justice that could bring under control the shadow economy of illegalities occurring behind the back of the baroque penal policy of the sovereign coinciding with a revolution in the techniques of institutional discipline. The result was the individualization of punishment and the growing power of the penal professionals. More recently, one the most explicit followers of Rusche and Kirchheimer and Foucault, Alessandro De Giorgi (2006), has analysed the effects that change to a post-Fordist production regime has had on punishment and control in the West. Prominent analysts of the massive growth of imprisonment in the United States since the 1970s, David Garland (2001) and Loïc Wacquant (2009) have also associated the development with changes in the economy and labour markets. Wacquant sees the United States as a living experiment in unhinged neoliberalism primed by its exceptional background of anti-government ideology, federalism, and strong social divisions. The growth of imprisonment was a response to the disintegration of its already residual social state and the change of American labour markets from a source of security into a source of insecurity and fragmentation. Neoliberalism according to Wacquant is, in fact, strongly interventionist towards poverty. Penal policy is coupled with punitive social policy. Both share a common disadvantaged target group (which Wacquant demonstrates convincingly), a common behavioural philosophy, and a common goal of creating a flexible labour reserve. Wacquant's analysis of the role of punishment combines materialism with symbolism loosely inspired by Durkheim. Prison signals social boundaries and normalizes inequality, redirects insecurities, and reunites the deserving sections of people. Wacquant's compelling analysis suffers from a failure to question the behavioural effectiveness of prison in regulating the labour reserve which seems contradictory as Wacquant strongly disputes its behavioural effectiveness in controlling crime.

A fact that has been increasingly recognized during the last 20 years or so is that the quality and harshness of criminal justice varies considerably between developed economies. A popular way of explaining these comparative differences is the concept of (national) *cultures* (see esp. Whitman 2003; Pratt and Eriksson 2013, cf. *culture* as meaning or as a

distinct area of social life). Garland (2006), however, warns that it has the danger of becoming naïve and totalizing—especially in an era where globalization erodes such differences:

"Comparative scholarship cannot rely upon totalizing national contrasts as an unproblematic explanatory resource. Nor can it be assumed that the specification of a culture's dominant themes and general figures will unproblematically explain specific practices in that society. Thus when Whitman (2003) invokes American culture in contradistinction to European culture, pointing to long-standing contrasts in attitudes towards matters of status and individual dignity as an explanation for contemporary contrasts in the intensity of punishment, he runs up against the problems of cultural pluralism, intracultural contestation and historical change." (Garland 2006, pp. 430–431.)

Furthermore, while I do not wish to make any sort of ethical condemnation concerning deterministic theories of technological materialism or cultural differences, finding aspects of reality that are perhaps more open to choice might have practical value. Although Wacquant (2008, pp. 265–270, 277–278) believes the reshaping of the social policy and the punitive turn do affect Europe as well, he also believes that the *institutions* of the welfare state continue to create differences between countries in levels and distribution of poverty. Long overshadowed by other approaches, institutional theory started to resurge in political studies in the 1980s. Sociological, rational choice, and historical frameworks among others have been utilized for institutional analysis. (Lowndes and Roberts 2013.) Institutional theory thrives in explaining stability in a presumably contingent world. Institutions set limits to decision making, ration power, and shape interests. Institutional reorganizations often caused by external shocks or paradigmatic change have lasting, path dependant consequences. A key tool towards explanatory clarity are institutional comparisons. (Hill 2013, pp. 69–84.)

Although not without precedent (see e.g. Savelsberg 1994), a ground-breaking contribution towards a neo-institutionalist comparative criminal justice was made by Cavadino and Dignan. Cavadino and Dignan (2006a) claim that institutions explain why penal differences have survived globalization. Somewhat confusingly and even contradictorily they call their approach “radical pluralism” instead of institutionalism. *Pluralism* (following Robert Dahl) refers to the belief that policymaking is highly contested horizontally between different interest groups. *Radicalism* (following Marxists) means recognizing the significance of vertical class divisions and inequality. This two-dimensional fragmentation makes the penal policy process very incoherent. The process is affected by both ideological and material factors. (Cavadino and Dignan 2002, pp. 28–31, 76–79, 2006b, pp. 12–14.) It is the comparative effort which in the book *Penal Systems* fortunately leads Cavadino and Dignan to some relatively generalized conclusions. Cavadino and Dignan find a straightforward correlation between criminal justice systems and welfare state regime types borrowed from Gøsta Esping-Andersen.

In *The Three Worlds of Welfare Capitalism*, Esping-Andersen (1990) argued that developed welfare states cluster according to significant qualitative differences. Esping-Andersen classifies welfare states based on their rate of *decommodification* and the system of *stratification* they impose. Decommodification refers to the extent the welfare state makes individual wellbeing independent of the markets. Cavadino and Dignan (2006b) follow Esping-Andersen's classification of welfare state types. *Liberal* (Anglophone) welfare states are characterized by minimal decommodification and inequality, which causes the effective exclusion of the most marginalized members of society from social and political participation. *Conservative* (Continental) welfare states are characterized by a moderate level of decommodification, the linking of full social rights with membership in traditional and modern intermediary institutions, and family as the basic unit of social policy. *Social democratic* (Nordic) welfare states are characterized by high levels of decommodification, an active state, and strong individual autonomy. Imprisonment rates are highest, juvenile justice is harshest, prison privatization has been taken furthest, and the penal crisis is, in general, worst in

liberal welfare states, followed by conservative welfare states in the middle, and social democratic ones in the lenient end. There is an inverse relationship between welfare state strength and the harshness of criminal justice which according to Cavadino and Dignan seems to mostly override the criminal justice philosophy of choice and even criminal law “in books”. Countries where social and economic policy decommodifies the individual the most form the markets have the least punitive penal systems (see also Wacquant 2008, pp. 279). They do not attempt to explain the relationship conclusively but merely suggest penal policy reflects the inclusivity or exclusivity of each welfare state culture and the attitudes of its elite.

Cavadino and Dignan were soon followed by Lacey whose work represents perhaps the most rigorous and resolute case for institutionalism in comparative criminal justice. In *Prisoners' Dilemma* Lacey (2008, pp. 3–61) deplores the marginalization of systematic comparisons in sociology of criminal law between theories of cultural singularity on one hand and global materialism on the other. Institutions stabilize and filter both cultural and material factors. The correlation discovered by Cavadino and Dignan calls for an explanation. This requires a more complete explanatory model of institutional interrelationships. How do institutions of the economy, welfare state, and politics produce different penal policies in a commonly shared material context? What determines a society's institutional capability to produce inclusive and reintergrative (i.e. normatively democratic) criminal justice? Lacey adopts Peter Hall and David Soskice's dichotomy of *varieties of capitalism*. The country classification is roughly compatible with that of Esping-Andersen's. Hall and Soskice (2001) argue that in (Anglophone) *liberal market economies*, businesses coordinate their network of relations primarily through the institution of markets while in (mostly Continental and Nordic) *coordinated market economies* they rely heavily on other institutions of information exchange, control, and deliberation. Institutional frameworks affect the profitability of different economic activities and thus create their own *comparative institutional advantage* meaning that globalization does not lead to economic convergence.

Lacey proposes that the model of political economy affects state's incentives to make criminal justice either inclusive or exclusive. The strategy of liberal economies to maintain economic competitiveness in globalization has been to increase income inequality and cut social spending thus pushing people in to social and, consequently, to penal exclusion. Prisons allow for the governing and warehousing of the surplus population. Coordinated economies have taken the route of high employment rates and productivity, which has gone hand in hand with the flexibility offered by welfare state investment. Inclusive social policy insures specialized know-how. This heavy investment in human capital raises the economic cost of penal exclusion. (Lacey 2008, pp. 77–90, 2011, pp. 222–224.) Liberal economies lack the institutional tools to regulate the economy and fight inequality in a changing material context which makes resolving the penal crisis hard. Scores measuring the level of coordination in the economy have an inverse correlation with imprisonment rates. (Lacey 2008, pp. 109–112.)

Lacey is more ambitious than Cavadino and Dignan in attempting to theorize on the relationship between policy regimes and punishment, and Lacey's model of institutional interrelationships between economic, social, and political institutions with each other and with penal policy promises a lot more theoretical clarity than Cavadino and Dignan's radical pluralism. The weakness in Lacey's attempt is its rational choice economism, and in the end Lacey is not able to advance much farther beyond the correlation. Lacey's (2008, p. 58) claim is that "such an economy, which functions in terms primarily of long-term relationships and stable structures of investment, not least in education and training oriented to company- or sector specific skills, and which incorporates a wide range of social groups and institutions into a highly co-ordinated governmental structure, may be more likely, other things being equal, to generate incentives for the relevant decision-makers to opt for a relatively inclusionary criminal justice system", but at no point does Lacey explain the actual causality between investment and penal policy. The closest she gets is telling that employer

organizations "have strong reason to use their considerable bargaining power with government to press for generous welfare provision for workers who are temporarily unemployed but whose skills remain necessary to the economy", while "the costs of pursuing socially exclusionary policies in areas such as criminal justice are relatively high" (Lacey 2008, pp. 79–80). Does this suggest that in coordinated economies employer organizations regularly participate in criminal justice policymaking and advocate moderation? Without evidence the notion sounds unlikely. The factor that policymaking requires negotiating at all might very well make it more coolheaded (Lacey 2008, p. 71) but that is not an argument based on incentives unless economic actors and considerations are involved. "By contrast", Lacey (2008, p. 109) believes "liberal market systems oriented to flexibility and mobility have turned inexorably to punishment as a means of managing a population consistently excluded from the post-Fordist economy" but does not explain what is the purpose of this penal management. If the argument is that the welfare state and imprisonment could function as alternative forms of social control, as Cavadino and Dignan (2011) point out, while there is some evidence that economic equality can reduce crime, there is little evidence that mass imprisonment is effective in that and could work as more than a symbolic patch for the welfare state in this regard (and Lacey seems to agree, 2008, p. 189–190). Furthermore, in urging for penal reform in the liberal economies Lacey (2008, pp. 185–189) brings up the huge costs of mass imprisonment, which seems to contradict the idea that it is the relative affordability of mass imprisonment in liberal economies (Lacey 2008, p. 59) that sustains it in the first place and that cost incentives really are a determining factor in the eagerness to utilize imprisonment. At times Lacey (e.g. 2008, pp. 82–83) suggests a parallel hypothesis that social distances created by inequality make it emotionally easier to inflict degrading punishment to the poor. I find this hypothesis much easier to accept but it relates to the production regime only indirectly through its influence on welfare state policy and redistribution.

As policies, decommodification (welfare state) and coordination (production regime) both refer to social and economic policies that regulate the economy in lieu of the supremacy of the market institution. According to Cavadino and Dignan, and Lacey, the strength of these policies is connected to the harshness of penal policy. The relationship is inverse and in a sample of developed economies more or less linear. If taken mostly as an empirical observation given the incompleteness of Lacey's theory, possible differences in nuance between the concepts are not of great importance.

As the most obvious source of policies, the political system could be a possible independent determinant of both economic regulation and penal policy. Lacey investigates the relationship of democratic systems with criminal justice. While Lacey occasionally refers to the incorporation of relevant partners in policymaking in coordinated economies (as in a quote above), she seems to include corporatism conceptually in the coordinated production regime instead of considering that institutionalized interest representation could be understood as part of the political system. Thus Lacey (2008, pp. 62–77, 2012, pp. 207–215) mostly reduces the political system to the electoral system: Proportional representation typical in coordinated economies favours the moderate left and aids in the building of coalitions needed to back inclusive economic and social policy. By contrast, in first-past-the-post systems popular in liberal economies politics revolve around winning over the so called median voter and the crime theme can be effectively utilized in achieving that. However, in an interesting natural experiment transition to proportional representation did not stop punitive penal trends in the liberal New Zealand, which leads Lacey (2012, pp. 216–227) to abandon the electoral system as the prime determinant of criminal justice in favour of the totality of the political economy.

Another explanation for the lack of change in New Zealand could be that other aspects of the political system are more crucial than the electoral system. Political scientist Arend Lijphart's richer analysis of democratic systems distinguishes between two ideal types: Lijphart (2012) defines *consensus democracy* as characterized, in general, by inclusion and compromising and, institutionally in the "executives-parties dimension", by strong parliaments, coalition politics,

proportional representation, and corporatism. *Majoritarian democracy*, reversely, is characterized, in general, by exclusion and conflict and, institutionally, by executive dominance, two-party system, and interest pluralism. Advocating consensus Lijphart presents statistical evidence from a regression analysis of 36 free countries that consensus democracies equal majoritarian democracies in effective governing and economic performance and that they systematically triumph in democratic quality as well as in “kindness” in the level of social expenditure and in penal policy among other measures. Lijphart also presents a “federal-unitary dimension”, in which consensus democracy is characterized institutionally by federalism and other arrangements that fragment power between institutions. However, they do not cluster together with the institutions of the executives-parties dimension nor do they correlate with the effectiveness, quality, or kindness of democracy. Table 1 summarizes six other statistical institutionalist comparisons all explaining the dependent variable of imprisonment rate. Their findings reinforce the idea of an inverse relationship between penal harshness and decommodifying economic regulation (measured as welfare state expenditure). With regards to meta-political institutions, imprisonment rates seem to have an inverse correlation with corporatist interest representation (the most recent study stressing its independent significance) and consensus democracy, which conceptually includes corporatism, while some of the studies have found a *positive* correlation with federalism. The studies have varyingly controlled for factors such as crime, multiculturalism, and unemployment.

Cavadino and Dignan, Lacey, and the statistical analyses leave us with an established correlation between imprisonment rates and economic regulation understood as decommodification and a hint that a fuller analysis of the interrelationship of penal and economic regulation with the political system and corporatism in particular might be a way forward. My intention is to show that Durkheim’s theories on law and politics are compatible with the correlations found between economic regulation, and corporatism and federalism with punishment, and offer a direction towards understanding the mechanics. I will start, however, by discussing the position of institutional regulation in Durkheim’s metatheory.

Table 1. Statistical institutionalist comparisons explaining imprisonment rates

Study	Sample	Research design	Explanatory variables	Control variables	Findings concerning imprisonment rate
Greenberg 1999	20 high income countries	Regression analysis	- Corporatism (score)	GNP, income inequality, crime	Inverse association with corporatism
Beckett and Western 2001	44 US states 1975–1995	Regression analysis	- Welfare state (welfare expenditure)	Minority presence, crime, unemployment, poverty, urbanization, Republican dominance	Growing inverse association with welfare spending
Jacobs and Kleban 2003	13 developed democracies 1970–1995	Panel study	- Corporatism (score) and federalism (score)	Minority presence, income inequality, unemployment, crime, “disorganization”, GDP, American, Anglophone, or Scandinavian exceptionalism	Inverse association with corporatism, direct association with federalism
Downes and Hansen 2006	19 OECD countries 1987–1998	Regression analysis	- Welfare state (welfare expenditure)	Unemployment, crime	Growing inverse association with welfare spending
Lappi-Seppälä 2008	25 industrialized countries, additional sample of 99 countries	Statistical correlations	- Welfare state (income inequality, social expenditure) - Solidarity (social and institutional trust) - Corporatism (score) - Consensus democracy in the executive-parties dimension (Lijphart’s score)	(Correlations for crime, unemployment, GDP, demographic heterogeneity, fears, and punitiveness and intercorrelations between variables tested separately)	Inverse associations with welfare state strength, trust, corporatism, and consensus democracy
Sutton 2013	15 developed democracies 1960–2000	Bayesian change-point model	- Welfare state (social expenditure, inflation) - Corporatism (score, union density) and federalism (score)	Proportion of young males and male participation rates (part of an additional hypothesis), left party dominance, crime	Punitive turn largely evaded countries characterized by corporatism, high union density, and centralization (while social spending and left dominance have lost their explanatory power)

DURKHEIM THE MORALIST

Cavadino and Dignan, and Lacey situate themselves broadly as adherents to the political economy school of sociology of criminal law. They do not devote much thought to Durkheim, but from the little they discuss him, it seems that their rejection or neglect of Durkheim as a possible ally for institutionalist sociology of criminal law derives precisely from a perception of Durkheim as a cultural theorist (see Cavadino and Dignan 2002, p. 73, 2006b, p. 9; Lacey et al. 2018, p. 201). There are, however, many traits in Durkheim's sociology that could make his theories appealing for someone looking for relatively stable explanations for differences that material theory cannot account for. Durkheim himself situated his approach very much in the midway of systematic comparisons between singularism and universalism that Lacey calls for in contemporary sociology of punishment. Questions of institutions and economic regulation are prevalent in Durkheim's works both in general and in relation to criminal law and punishment. As elaborated in *The Rules of Sociological Method*, important to Durkheim's (1938) methodology were the concept of *social fact* as well as causal explaining and open-mindedness. For Durkheim sociology is about types and categories that lie between historical singularity and universal humanness. A social fact is external to individual psyche, socially constraining, and independent of its individual expressions.

Of particular interest to the possibility of reading Durkheim in a realist and institutionalist fashion is the preface of the book's second edition where Durkheim discusses emergence and the concept of institution. Social facts receive their causal force from their emergent quality:

"Whenever certain elements combine and thereby produce, by the fact of their combination, new phenomena, it is plain that these new phenomena reside not in the original elements but in the totality formed by their union. The living cell contains nothing but mineral particles, as society contains nothing but individuals. Yet it is patently impossible for the phenomena characteristic of life to reside in the atoms of hydrogen, oxygen, carbon, and nitrogen. ... The inanimate particles of the cell do not assimilate food, reproduce, and, in a word, live; only the cell itself as a unit can achieve these functions. ... Let us apply this principle to sociology. If, as we may say, this synthesis constituting every society yields new phenomena, differing from those which take place in individual consciousnesses, we must, indeed, admit that these facts reside exclusively in the very society itself which produces them, and not in its parts, i.e., its members."
(Durkheim 1938, pp. xlvii–xlviii)

People are born to a world of institutions: "We ourselves took no part in their formation, and consequently we cannot by introspection discover the causes which brought them about. Furthermore, even when we have collaborated in their genesis, we can only with difficulty obtain even a confused and inexact insight into the true nature of our action and the causes which determined it." (Durkheim 1938, p. xlv.) Institutions are beliefs and modes of conduct whose origin is in collective action. Durkheim (1938, p. xlvi) mentions state, family, property rights, contract, and punishment as basic examples of institutions. "Since this joint activity takes place outside each one of us ... its necessary effect is to fix, to institute outside us, certain ways of acting and certain judgements which do not depend on each particular will taken separately." (Durkheim 1938 p. lvi.) As the concept covers the idea of a social constraint or fact so well, Durkheim (1938, p. lvi) goes on to say that sociology could even be "defined as the science of institutions, of their genesis and of their functioning".

Institutional regulation has an important position in Durkheim's sociology that tends to receive little attention in culturalist readings of Durkheim (e.g. Alexander 2005). Durkheim is depicted as becoming a cultural theorist after abandoning the materialism of his early works. An overarching theme in Durkheim's work which determined Durkheim's objects of study from the division of labour to religion was the conditions for the creation of morals (Joas

1993). Durkheim deemed the decaying collective and religious morality of the past as both unfitting and undesirable for the modern secular society but maintained it needed to be replaced with a new and fitting one. The pathology of the modern society was the absence of this taking place. The anxiety could not be solved by libertarian capitalism and its extreme alternative communism because both reduced social problems to material conditions and dismissed their moral nature. So, what did this *moral* nature mean? In his *Moral Education* lectures Durkheim (1973, pp. 17–126) defines morality as a regulating set of norms and a social fact external to the individual. Morality is accepted internally instead of being accepted for instrumental reasons. Self-discipline releases the individual from instincts to reflexion and hence to self-determination and freedom. The same applies to the society at large. Discipline does not suggest blind obeying. As opportunities and the environment change, the moral needs to change as well. In addition to discipline morality requires social attachment—ultimately to the humankind but in the world of nation states to its surrogate: one's own society, and simultaneously to social groups of lower levels. Morality is categorical and distinct from egoism. A *moral act* is something not done to benefit oneself, one's own group, or any single group but something done for the social good. Durkheim's example illustrates what this means: Charity is only quasi-moral. Organized social security is genuinely moral. These same general themes mark Durkheim's discussions of morality beginning from his early *The Division of Labour in Society*.

Durkheim was frustrated with the lack of actual social change under the tumultuous surface of his native France of the long nineteenth century. Normatively Durkheim was committed to economic justice and the enhancement of individual freedom. Politically Durkheim can be contextualized as an academic representative of a broader *solidarist* movement alternative to both laissez-faire liberalism and economic collectivism (Hayward 1960; Tiryakian and Morgan 2014). Durkheim had favourable if qualified views on socialism: he believed the industrial society needed moral maturity instead of collapse and upheaval (Gouldner 1962). He had concluded that revolutions, while potentially intellectually inspiring, were poor at creating institutions (Gane 1984, pp. 325–326). *The problem of moral order in modern societies which concerned Durkheim comes down to the lack of economic regulation*. Durkheim returns to this time and again. Normlessness (*anomie*) in industrial capitalism called for an institutional reform of the state and society: What was required was the political engagement of everyone, removal of inequalities, and secular education. (Müller 1993, pp. 95–96.) The nature and actors of this reform will be discussed below. The way Durkheim repeatedly and beginning with *The Division of Labour* distinguishes himself from the advocates of economic determinism is by the stress he gives to the significance of the normative order. Both the materialist extremes of market libertarianism on one hand and utopian communism on the other promised to free the society from the uncertainty of moral administering. For example, the early Soviet legal scholar *Evgeny Pashukanis* (1980, pp. 46–49, 101–109) believed that, following post-revolutionary reorganization of material relations, class and individual interests will fuse and morals, law, and the state will cease to exist. When Durkheim proclaims there is no purely material solution to the social question, he means that modern societies require constant regulating as do all communities. Accepting any kind of compromise between the two materialist extremes sentences the society to never-ending regulatory discretion and adjustment—and accept we must, according to him.

Durkheim does grant purely material factors such as human geography causal significance, but he also gives that to institutional structures. People are born to a pre-existing world and to pre-existing social facts, which are real to the individuals although new ones can also be created and old ones altered. In fact, what makes the *social type* in its most basic Durkheimian sense as a spatial and communicative human formation significant is precisely whether and to what extent the environment exists for the social structures to start emerging:

"There are always beliefs and practices common to men which are not inscribed in their tissues. But this character is more manifest as the social mass and density grow. The more people there are in association, and the more they react upon one another, the more also does the product of these relations pass beyond the bounds of the organism. Man thus finds himself placed under the sway of causes *sui generis* whose relative part in the constitution of human nature becomes ever more considerable." (Durkheim 1933a, pp. 345–346.)

Moral, which is general and external to the individual, can only emerge in a community. The external nature may even give it a supernatural air. The existence of solidarity and hence the community is conditional to it. These general ideas are present in Durkheim's work from *The Division of Labour* even to his late *The Elementary Forms of the Religious Life*, where Durkheim (1915) concludes that religion is the force of community external to the individual experienced as supernatural. Religion builds on the material bedrock of the social type but creates unreducible consequences.

DURKHEIM'S SOCIOLOGY OF LAW

Durkheim wanted to understand what makes societies possible. For him law is an instrument of social regulation, and especially in modernity it becomes the basis for social coexistence (Vogt 1993, pp. 71–72). Durkheim (1933a, pp. 32–69) starts *The Division of Labour*, the prime source for his legal thinking, by making the case for the sociological and empirical study of morals. Moral facts are, according to him, real and therefore cannot be discovered or changed purely as mental or philosophical exercise. The motivation for the study was to survey the regulatory reality and ways to improve it. Law in this context was an observable operationalization of the regulatory state of society. Durkheim poses the normative question, should social division of labour be embraced despite warnings of its alienating effects. He suggests that division of labour is, in fact, a moral force necessary for the cohesion and thus existence of large societies.

In *The Division of Labour* Durkheim (1933a, pp. 70–110) defines a crime by the reaction it evokes. An offended sentiment elicits a passionate defence. Shared sentiments are particularly strong as are the reactions they arouse. *Crime* is an act which violates a strong and defined shared consciousness and is *punishable* by law. Because the sentiment is collective, so is the reaction, and if there is no collective reaction, the norm weakens. Punishment protects uniform normative expectations. Punishment is an emotional and collective expiation of the crime. Its intensity is relative both to the strength of the collective sentiment and to the magnitude of the breach. As a collective reaction it is (genuinely) external to the individual and therefore often given a religious interpretation. It brings people closer together and is an opportune moment for smooth social organization. *Repressive law* (criminal law) corresponds to a traditional type of *social solidarity* (composition of social ties) based on likeness which Durkheim calls *mechanical solidarity*. When solidarity is built on strong *collective consciousness*, deviation is socially dangerous in itself. Durkheim concludes that the predominance of criminal law in a society measures its reliance on mechanical solidarity.

The same notion of punishment but in the form of a practical theory can be found in the *Moral Education* lectures. Punishment has little effect in deterring from rule-breaking or conditioning the rule-breaker. However, punishment indicates to the community that the rule continues to stand and helps to preserve its authority. The essence of punishment is reprimand—not suffering. A good punishment is proportional and minimal. Great vertical social distances, however, lead to penal abuse. (Durkheim 1973, pp. 158–206.)

Durkheim proposed that the welfare state could create a new form of solidarity in functionally differentiated societies (Flora and Heidenheimer 1981, pp. 23–24). In growing societies rising population density together with the development of transportation and communication technology increase competition between people, which people seek to avoid by compartmentalizing professionally. Division of labour is struggle for survival which allows a growing number of people to exist together. Society creates the specialized individual. Secondary factors weaken the collective

consciousness and facilitate this specialization: Life experiences of people become decreasingly shared in a large society, and the collective consciousness becomes more abstract and law less casuistic. Urbanization weakens the social control imposed by tradition and community. Tolerance towards deviation increases. The natural amendment for the crumbling of mechanical solidarity in high modernity is *organic solidarity*: cohesion based on the cooperation and growing interdependence of unlike people defined by reverence towards the individual whose unique value for the society increases. The collective moral foundation for this new form of solidarity is positive *restitutive law* (family, contract, commercial, procedural, administrative, and constitutional law), which creates the conditions for the formation of specialized relationships. Disturbances are not expiated with a punishment but simply corrected. The predominance of positive restitutive law in a society measures its reliance on organic solidarity. (Durkheim 1933a, pp. 111–132, 168–173, 256–263, 266–271, 283–301, 396–405.) The nature of criminal law itself as penal law remains (cf. Mead 1918), but its significance for social cohesion diminishes. Contrary to classical liberal theory, democratization and growing individualism do not mean a decrease in regulation and the advent of a night-watchman state. The absoluteness of power and the abundance of regulation do not go together. Rather, the growing number of particularized relationships calls for a more and more complex social regulatory framework. It is only the balance between the regulatory types which changes. The extent of criminal law and restitutive regulation correlate negatively. (Durkheim 1933a, pp. 200–229.)

While attempting to prove his theory Durkheim (e.g. 1933a, pp. 133–146) makes huge journeys in time and space, I contend that mechanical and organic solidarity are better taken more cautiously primarily as conceptualizations of alternative ways of constructing cohesion in modern states albeit the first one relying more on tradition and the latter one being perhaps truer to the course of social development. Said in Durkheimian terms, modern societies too need regulation, but it must fit the new social type and therefore be predominantly restitutive. People are socially and morally enabled, and those aspects of life should not be done away with. However, by claiming progress towards organic solidarity is normal Durkheim is, I would argue, only saying it is structurally consistent. Durkheim is sometimes caricaturized as believing law would spring spontaneously from the moral will of the people. The contrary is true. *Book Three of The Division of Labour* returns the reader to reality from the ideal-typical vision of organic solidarity (Rawls 2003). The restitutive moral framework awaits setting up (Durkheim 1933a, pp. 406–409): “This is far from being on the verge of realization. We know only too well what a laborious work it is to erect this society where each individual will have the place he merits, will be rewarded as he deserves, where everybody, accordingly, will spontaneously work for the good of all and of each.” (Durkheim 1933a, p. 408.)

Durkheim’s discussion of the pathological forms of division of labour that afflict the society in the meantime can be used to help clarify the substance of the lacking restitutive regulation. In *anomic division of labour* capital and labour are uncoupled and workers are treated like cogs in the machine. This would be solved by increasing regularity and harmony in the economy by regulating terms of employment and other trade specific concerns. In *forced division of labour* individual autonomy and social mobility are lacking. These constraints should be relieved by increasing the “external equality” of parties in contractual relations. It seems strongly that by this Durkheim means some level of decommodification: According to Durkheim, contractual solidarity requires that a party is autonomous enough from the markets to refuse an unfair contract. He continues that the same logic of justice demands that people’s livelihood is made increasingly independent not only of inherited status but also of their ability to contribute. Durkheim emphasizes that this equality and emancipation is not natural (physical) but a result of institutions and regulation. (See Durkheim 1933a, pp. 353–388, 1957, pp. 208–220.) As will be discussed below, Durkheim assigns the task of fixing the anomic

division of labour primarily to modern intermediary organizations and the task of fixing forced division of labour to the democratic state.

In sum, according to Durkheim, in a modern heterogeneous society a strong restitutive regulatory framework can build society-wide cohesion and limit the promotion of penal sanctions. Although Durkheim defines positive restitutive law as encompassing essentially all law except criminal law and property law, the core of Durkheim's concern is economic regulation and decommodifying social security. Alternatively, if the socioeconomic organization is deregulated and constrained by tradition and inheritance, (subgroup) mechanical solidarity and its associated form of law prevails. The basic conclusion is the same that Cavadino and Dignan, Lacey, and the referenced statistical analyses have made: an inverse correlation between the level of economic regulation and intensity of punishment in society.

POLITICAL CONDITIONS FOR ORGANIC SOLIDARITY

Durkheim (1983) repeated in a dedicated article about penal evolution his argument that the intensity of punishment has a negative correlation with social complexity but added that it also has a positive correlation with state absolutism. The article is cursory, and just as his first argument could hardly be understood from it without reference to his general legal theory, the second one necessitates familiarization with his political theory.¹ Already in the *The Division of Labour* Durkheim (1933a, pp. 181–190, 301–303) had associated the two solidarity types with corresponding social structures: Mechanical solidarity is consistent with a society made up of self-sufficient (geographical) segments such as provinces. Organic solidarity is consistent with a society made up of differentiated organs where the professional milieu transcends regional divisions. In this respect he considered the actual contemporary lack of professional social and political organization pathological. Later, when Durkheim's alarm over economic deregulation only worsened, he blamed it on the lack of these modern intermediary institutions between the individual and the state. Durkheim (1933b, pp. 1–4, 1957, pp. 5–13) accepted that the economy becomes an increasingly central field in modern societies. For that reason it should be organized and regulated more, or else its normlessness threatens to contaminate other fields of life as well. Therefore, while secular education could alleviate the anomie (Durkheim 1973, pp. 223–236), the practical solution that it most called for was the reintroduction of guilds as *corporations* (here trade associations). In Durkheim's vision, corporations are given the moral task of formulating economic regulation in matters such as terms of employment, occupational safety, and pensions (Durkheim 1952, pp. 306–320, 1957, p. 40, cf. Hawkins 1994).

Corporatism refers to an idea of society as a social body divided into functional organs with legal personhood. Medieval Europe saw the rise of self-governing sectoral corporations such as guilds and universities, yet they eventually lost to absolutist state power. With time an academic concern about social disintegration led to the building of progressive corporatist theory calling for the labour movement's integration to the social order along with the capital. Arrangements started to appear where trade unions were given benefits and access to power in exchange for industrial peace and where agreements were made between employers and employees under state coordination. Early applications of corporatism were, however, often authoritarian and marked by a lack of the autonomy corporations had been afforded in theory. It was only the post-war Europe which saw the coming of *social corporatism* respectful of freedom of association anticipated by the likes of Durkheim. In the inclusive, participatory, and democratic neo-corporatism of developed European welfare states corporations represent upwards as well as deliberate, create, and sometimes execute regulation. (Wiarda 1997, pp. 28–46, 95–123.)

¹ In the article Durkheim among other things neglects to explain why modernization is associated with growing individualism. The two correlations are not the two laws mentioned in the title of the article but two aspects of one of them (the “quantitative law”).

Setting the stage for Durkheim's corporatism, one trait prevalent in Durkheim's work in general and typical for Continental corporatist thinkers (see Black 1984, esp. pp. 129–142) but alien for much of liberal theory is the way Durkheim does not make strong distinctions between formal and affective relationships and civil and personal interactions just as he does not make a strong distinction between law and morality. What was more distinctive was Durkheim's embracement of division of labour and society over community. Many socialists, in particular, were much more intrigued by the ideal of the *commune* as a territorial unit and co-operative of self-governing workers (Black 1984, pp. 189–192). Durkheim makes a qualitative choice in favour of forms of association that are structurally compatible with division of labour at the expense of the geographical corporatism of communes. Durkheim does not demonize the state either: Durkheim combines corporatism with Jean-Jacques Rousseau's idea of an alliance between the individual and the state: individuals independent of each other and dependent on the state. Democracy can tame the state into an emancipatory force.

Edward Tiryakian (1994) pointed at the contemporary topicality of Durkheim as an early theorist of corporatism as a solution to deregulation, but the insight has remained persistently underdeveloped. According to Durkheim (1933b, pp. 4–25, 1957, pp. 14–39), industrialization had destroyed the guilds because markets had outgrown them geographically. What was lost with them was their social significance. His suggested new corporations would be nationwide and democratic. This would require consolidating existing trade unions, recognizing their public role, and making contacts between the employee and employer sides regular while maintaining their separateness.

Durkheim outlined his theories of democratic corporatism and corporatist democracy in his sociology lectures (*Professional Ethics and Civic Morals*), which are interpreted here as a “coherent extension and practical application” (Black 1984, p. 223) of the social theory Durkheim had constructed hitherto. Intermediary institutions are needed for the creation of the secular moral regulation required for solidarity. When they are missing, the state will try to compensate, but because it does not have direct lines to the individuals and instruments for causing internal change in them, the nature of its regulatory efforts is mechanical and repressive. However, socialization by communities always has a dark side too, and thus it is the task of the modern state to guarantee universal individual rights. As individualism grows stronger, so does the state and expands its functions. Individual rights must be won from the communities, and to do so negative freedoms are not enough. (Durkheim 1957, pp. 55–68.) It requires positive action from the state: “For this task, it cannot just withdraw into the tribunals, it must be present in all spheres of social life and make itself felt.” (Durkheim 1957, p. 65.) The nature of statist individualism being moral the individual that the state is to promote to earn its legitimacy is universal in contrast to the “me” of egoism. Acting on this agenda in the quasi-humanity of the nation state happens primarily within the field of domestic policy. Concentrating on internal improvement can turn states more peaceful. (Durkheim 1957, pp. 68–75.)

The state is society's institution for reflection in all forms of government. What makes *democracy* special is the publicity of the reflection as well as the amount of communication between the state and the people and the expansion of state's domain. Publicity brightens the reflection and increases the plasticity of society. Communication increases the state's awareness of regulatory needs, enhances its governing capabilities, and gives democratic law its legitimacy. The notion of democracy as the measurement of the will of the people, the majority, or the plurality is mistaken. Law and social change cannot spring spontaneously from a multitude of individual opinions. While the state should be in continuous communication with the people, it still needs to preserve its autonomy. This circles us back to the intermediary institutions. They are needed for facilitating political participation of individuals and deliberation in a manageable scale and filter it upwards. (Durkheim 1957, pp. 76–109.) Thus, corporations both protect the individual from the repressive clumsiness of the absolutist state and the state from the noise of unclarified public opinion.

Among new institutionalists, Hall and Soskice in their theory on varieties of capitalism agree with Durkheim that in the absence of a balance of power between corporatist associations and the state, the state has few tools to regulate the economy.² Durkheim and Lijphart are not only united by a consensual understanding of democracy as deliberative and institutionalized will formation and by including corporatism to the framework of democratic institutions. They both also proceed from the challenge of a heterogeneous society as their starting point. However, a distinction follows: Lijphart's primary interest has been the workings of democracy in traditionally multicultural societies. Durkheim's focus was on the secular individualism rising from the weakening of traditional communities. This is the reason Durkheim prefers corporatism over federalism as antidote to state absolutism and visions it as replacing the receding facilitation of regional differences. Only corporatism is structurally consistent with division of labour and organic solidarity. It is tailor-made to create the moral basis for organic solidarity in a developing democracy. Notably, while Lijphart is theoretically open to there being multiple paths to consensus democracy, empirically he finds the correlates he is looking for only for the first dimension of consensus democracy, which includes corporatism, and not for the second, which includes federalism (see also Swank 2002). In comparative criminal justice the extremes of course seem to be the pluralist and federalist United States and the corporatist and relatively centralized Nordic countries.³

It seems that "organic" individualist solidarity is the solution even if the problem is multicultural strife because individual autonomy alleviates the need to seek security from groups and reduces the salience of differences between them in the first place. Constructing loyalty towards the state across social classes and ethnic groups was, in fact, the explicit goal of early welfare state policy in Durkheim's days. In modern theory this effect is usually conceptualized as the ability of welfare states to build *social trust* or *capital*. What matters here are universalistic social rights: Charitable, means tested social security does not unite but categorizes. (Crepaz and Damron 2009. See also Garland 2013.) Means tested social security and income inequality increase "welfare chauvinism" which consequently is weaker in universalistic social democratic welfare states than in conservative and liberal ones (van der Waal et al. 2013, cf. Barker 2012). Lars Trägårdh (1997) conceptualizes the Nordic model as this kind of Rousseauian alliance between the individual and the state where dependence on the welfare state gives the individuals autonomy from each other. Individualist and universalist social security and corporatism have reduced the importance of traditional and religious intermediary institutions. "Hot" communal trust has been relatively replaced by "cool" societal trust. While the individualism reinforces tolerance towards a diversity of lifestyles, it demands assimilation to its structural logic including for example putting individualized children's rights before traditionalist parents' rights. It is compatible with moderate immigration but not with growth of social distances. (Trägårdh 2017.)

In summary, new institutionalism has offered three (partially overlapping) correlations for humane criminal justice: strong welfare state (decommodifying economic regulation), coordinated production regime (economic regulation and corporatism), and consensus democracy. Durkheim offers a streamlined causal explanation: Corporatism is understood as a democratic institution. Restitutive (social and economic) and repressive (criminal justice) regulation are understood as *alternative* collective moral foundations for solidarity. Corporatist democracy is a causal condition for the ability of a

² See Hall and Soskice 2001, pp. 45–50. "In general, liberal market economies should find it more feasible to implement market-incentive policies that do not put extensive demands on firms to form relational contracts with others but rely on markets to coordinate their activities. ... Because of the bluntness of the instruments available to states and the importance of markets to these economies, deregulation is often the most effective way to improve coordination in LMEs." (P. 49.)

³ So-called restorative (criminal) justice despite its superficially Durkheimian sounding name is communal justice of a segmented society especially in its more ambitious forms of conferencing and sentencing circles (see Shapland 2011), and (against its ideological premises) seems to thrive better alongside high imprisonment rates in Anglophone countries than in corporatist countries (Wood 2015).

modern society to build its cohesion predominantly on welfare state regulation over penal regulation. Corporative association of economic groups and the acknowledgment of these groups by the state leads to increased economic regulation made possible by the intermediary institutions, increased political participation by people facilitated by the intermediary institutions, increased concern towards ensuring individualistic and universal social rights in increasing number of policy domains by the democratized state, and a decreasing reliance on penal justice by the state.

In this framework Nordic social democracy would be closest to Durkheim's vision of corporatist balance of power and Anglophone majoritarian democracy and pluralism closer to the opposite of a dichotomy of the individual and the (federal) state. What distinguishes Continental "conservative corporatism" from social democratic corporatism might, in fact, be the relative weakness of the state towards both traditional and modern intermediary groups.

CONCLUSION

Hans-Peter Müller (1993, pp. 106–107) wrote how curiously Durkheimian the contemporary Western European reality is with coordinated economies and strong welfare states. Müller thinks this is ironic considering how Durkheim exaggerated the significance of moral regulation and underestimated that of power and interests. I argue taking institutional regulation seriously is the very reason Durkheim got it so close. Durkheim did not disregard conflict or social change (cf. Garland 1990, pp. 47–81). They were his departure points (Giddens 1971). For Durkheim, the lack of social change was the problem and structural solving of conflict its solution.

Durkheim's understanding of punishment as something relatively collective and non-instrumental as well as incompatible with restitution seems very reasonable after the collapse of the special preventative paradigm in the 1970s, the relatively judicial character it has persistently kept, and the strong emotions it continues to evoke. It also lends itself to be read as an institutionalist theory of the "political economy of punishment" in a way that is not recognized in the sociology of criminal law. In Durkheim's theory in a simple community punishment asserts the unity of the group. Vertical distances increase penal harshness. Individualization and secularization in modern societies should lessen the intensity of punishment as homogenous collective consciousness declines. However, this requires building societal ties on something else. By decommodifying individual wellbeing welfare state regulation can act as the foundation for solidarity of interdependence for a society of heterogeneous individuals. This leads to an inverse relationship between the strength of the restitutive regulatory framework and the amount of penal repression in society. This can be compared to theories that look for qualitative similarities between penal policy and social policy. The question is not whether the welfare state can turn prisons into welfare institutions (or whether the welfare state is just an extension of the state's penal suppression). The Durkheimian assumption would be that, while some qualitative evolution does occur, the basic nature of punishment is not going to change. However the welfare state can reduce its use. Both Durkheim's notion of organic solidarity and the inverse relationship of the regulatory types are empirically supported. Complex societies call for complex regulation, and building it is demanding. It requires communicative, deliberative, and participatory will formation. In modern societies the distance between the state and the people is great, and without intermediaries closing the gap the state will be ineffective at both listening to and governing the people. Durkheim saw social corporatism—institutional democratization of the economy, programme making, and policy formulation—as structurally suited to correct economic normlessness.

It remains a pertinent message that to function effectively democracy relies on intermediary institutions and practices usually not constitutionally established—that the simple mechanism of a general election does not translate into thought-out policies and positions without reflection and deliberation somewhere—and that these institutions should not be limited to ones representing the elite. Regarding the contemporary practical worth of Durkheim's theory, it can

certainly be asked whether for example the markets have once again geographically outgrown the guilds and what this means for the corporatist systems of Europe. Durkheim of course did not see the nation state as the end of human development but envisioned, although without going into details, the coming of systems even larger and more complex.

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